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SUPREME COURT OF THE UNITED STATES.

No. 329.

OCTOBER TERM, 1880.

JAMES M. WOOD, PLAINTIFF IN ERROR,

vs.

JOSEPH W. WEIMAR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Points, Argument and Assigned Errors for Plaintiff in Error.

L. D. NORRIS, Of Counsel.

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L. D. NORRIS, OF COUNSEL.

The contention in this cause is as follows:

Plaintiff below and in Error sued for a stock of hardware. He claimed under a chattel mortgage, of date May 25th, 1875, from Charles Stewart to him. Value of the stock as found by the Court, "at commencement of suit," $8,870.46. Debt, secured by the mortgage, $10,465.46.

The action was replevin, under the Michigan statute, and was commenced October 11th, 1875. Stock was taken on the writ October 19th, 1875, and bonded to defendant in the sum of $20,000.

The Defendant below and in Error, was Sheriff of Berrien County, Mich., who on the 15th day of July, 1875, had seized and attached the stock, in the custody of the mortgagor [not *subject* to the chattel mortgage of plaintiff, but under claim that it was fraudulent and *void*.]

These attachment creditors of the mortgagor, were nine in number, and their claims agregated $7,601.77. Such *claims* were not judgment claims, but went into judgment in the state court *after* the issue in this replevin suit was joined. No execution.

Issue was joined in this case *in the Circuit Court for Berrien County*, Dec. 18th, 1875.

Order of removal to United States Circuit Court for Western District of Michigan, Feb. 2, 1876.

First trial by jury and judgment for plaintiff for $182.25, (proceeds of small sales made by sheriff while in possession) June 13, 1876.

This Judgment set aside Nov. 17, 1876.

Jury waived June 12, 1877.

Second trial, finding of facts and judgment for defendant for $5,575.10, April 3, 1878. [Record, p. 71, folio 133.]

April 18, 1878, 10 days stay of all proceedings. [Record, p. 71, folio 133.]

May 1, 1878. Same, 25 days. [Record, p. 71, folio 134.]

May 24, 1878. Same, 20 days. [Record, p. 72, folio 135.]

June 11, 1878. Amended *finding filed*. [Record, p. 84, folio 167.]

June 12, 1868. Former judgment vacated, on motion of defendant, and new judgment entered under amended finding for defendant, same amount, $5,575.10. [Record, p. 72, folios 136 and 137.

POINTS.

I.

The facts found do not support the judgment, in this, to wit.:

The court rules and holds as matter of law:

"That Replevin would *not* lie" (by the plaintiff, chattel mortgagee) "against an officer who levies" (by writ of *attachment* against mortgagor) "upon personal property covered by the chattel mortgage, while in possession of mortgagor." [Record, p. 73, folio 173.] It having been found as an ultimate *fact* "that there was no fraud whatever in the chattel mortgage, and that it was a valid security." [Record, p. 77, folio 149.]

It clearly appearing that such levy was *adverse* to the mortgage claimed to be fraudulent.

II.

The court holds and rules as matter of law: That "the levy on such mortgaged property against the mortgagor, "*subject*" to the lien created by the mortgage, is valid, and * * replevin by the mortgagee will *not* lie." [Record, p. 74, folio 139.]

There being *no* finding of fact that such levy was made "*subject*" to the mortgage lien; while the fact that such levy was "adverse, and not "*subject*" to the mortgage lien, clearly appears in all parts of the Record,—is in no way disputed—being the SOLE *basis* of defendant's contention.

ARGUMENT.

On September 15, 1877, during the trial, the attorneys for the defendant presented and filed a written request for a special finding, that "the court find *the facts* as well as the law in this cause and embody the same in the finding; and pass upon certain propositions of law, among others as follow, viz:

1. "The evidence shows that this action of replevin cannot be maintained." This was found.

2. "The chattel mortgage must be deemed fraudulent in fact." It was found *not* fraudulent in *fact*.

3. "The chattel mortgage offered in evidence must be deemed fraudulent in law." It was found *not* fraudulent in *law*. [Record, p. 70.]

The court made *a special finding of the facts* on June 11th, 1878, [Record, p. 77,] and filed with the clerk on the same day, [Record, p. 84,] upon which judgement was entered June 12th, 1878, as follows, viz:

"This cause came on to be tried by the Court without a Jury, and and after hearing the proofs and allegations of the parties and the arguments of the counsel, and after due deliberation thereon, the Court now here finds that the defendant *did not unlawfully detain* the goods and chattels in the said plaintiff's declaration specified, as therein alleged; that the value of said goods and chattels at the commencement of this suit was $8,875.46, and that the *defendant hath a lien upon, or special property in* the said goods and chattels to the amount of $5,575.10 and that said *plaintiff is entitled to the remainder of said value*, after deducting all moneys herein adjudged in favor of said defendant. And whereas the defendant has duly waived a return of any of said goods

and chattels, and has prayed judgement for their value, or so much thereof as he is entitled to; therefore it is considered that the said plaintiff take nothing by his suit, and that the defendant go thereof without day. And it is further considered that the said defendant do recover against the said plaintiff the said sum of $5,575.10, being the amount of his special property in the aforesaid goods and chattels, so by the court in form aforesaid found, together with his costs and charges in this behalf expended to the taxed." [Record, pp. 72-73.]

The plaintiff brings errror; for that the facts found by the court are not sufficient to support the judgment, and also upon exceptions taken during the trial, and settled and allowed by the court. [Record, pp. 77 folio 149.]

A. In Michigan the distinction between replevin in the *cepit* and replevin in the *detinet* does not exist. The action is always for an unlawful detention, even where the taking was unlawful.

Hickey vs. Hinsdale, 12 Mich., 103.

Le Roy vs. East Saginaw, 18 Mich., 240.

Sexton vs. M. Dowd, 38 Mich., 148.

B. The issues of law and fact are made by the pleadings, as follows, viz.:

1. The Plaintiff's declaration conforms to the practice of Michigan; [Record, p. 5.] when the cause of action arises from an unlawful taking.

The plaintiff was mortgagee of the property with the right to immediate possession, which was expressly given by the mortgage itself; [Record, p. 78.] the mortgagor (Stewart) being a mere custodian for the Plaintiff by permission and *not by contract*.

2. The defendant by his plea and notice, sets out nine writs of attachment against the mortgagor, (Stewart,) that had been placed in his hands as sheriff of the county of Berrien for service, and he says "that by virtue of the said writs *he seized the goods and chattels described in the declaration.*" [Record p. 6.]

Also by his plea and notice he avers that the plaintiff's mortgage was made *with intent* on the part of both Stewart and the plaintiff, to hinder, delay and *defraud* the creditors of Stewart. [Record, p. 7.]

REPLEVIN WILL LIE.

Upon the special finding of the facts made by the court, the defendant was not entitled to the Judgment given in his favor that Replevin will not lie for the Plaintiff.

I.

1. As to the first issue of fact, whether or not the plaintiff held a mortgage on the property to secure an indebtedness, the court found that Stewart gave a mortgage to the Plaintiff May 25th, 1875, upon a stock of goods fixtures and other personal effects then in Stewart's store at St. Joseph, Michigan, to secure the payment of $10,456.46, with interest, on or before November 25th, 1875. [Record, p. 74.]

Certain exhibits are made part of the finding of the facts, [Record, p. 77, folio 150,] and among these the chattel mortgage itself. [Record, pp. 77 and 78.]

The Court also found that the amount secured to be paid was represented by seven promissory notes made by Stewart, five to the plaintiff as payee, amounting to the aggregate sum of $4,873. The Court found its authority to determine the amount secured, in

Shiras vs. Craig, 7 Cranch 51, Marshall C. J; followed in

Lawrence vs. Tucker, 23 Howard 26, Wayne J.

The court finds and makes various deductions from the total amount secured by the mortgage, which will be considered later in the argument, in discussing the *assessment of damages*. Here it is sufficient for the argument, to say, that provided there was *any* bona fide debt secured by an honest mortgage, the mortgage should hold *possession* of the mortgaged property in the light of the facts found in this Record.

C SUMMARY OF THE ISSUES TO BE TRIED.

1. *On the part of the Plaintiff:*

a. Did he hold a valid mortgage on the property to secure an indebtedness to him?

b. Did such mortgage give him an immediate right to the possession, as against one who should take away the property unlawfully?

2. *On the part of the Defendant:*

a. Was the defendant Sheriff of the County of Berrien?

b. Did he take the property by virtue of the writs of attachment mentioned in his plea and notice?

c. Was the plaintiff's mortgage made with intent to hinder, delay and defraud creditors, and therefore void?

The foregoing were issues in the cause to be tried and *determined before any* assessment of damages could be made.

The first issue of fact was found by the court in favor of the plaintiff.

II.

As to the second issue, which is one of fact and law, whether or not the plaintiff, by virtue of the mortgage, had an immediate right to the possession of the mortgaged property as against one who should take it away unlawfully, the court found that the mortgage authorized the plaintiff to take pos eesion of the mortgaged property at any time when he deemed himself insecure. [Record, p. 74.] The mortgage itself, as above stated, is part of the finding, and it contains a clause in the following words, viz:

"And the said James M. Wood is hereby authorized, at any time when he shall deem himself insecure, to take possession of said goods, chattels and personal property, and the same retain in some convenient place, at the risk and expense of the said Charles Stewart, until the said sum of money shall become due as aforesaid." [Record, p. 78.]

The court also found that Stewart remained in possession, "*as the terms of the mortgage implied he should,*" and continued selling in the usual course of his business. [Record, p. 74]

But the mortgage itself is silent as to the property remaining with Stewart for a moment. He was custodian for the plaintiff; a mere servant. The plaintiff on the other hand had a special property in the goods and chattels, with the right to their immediate and exclusive possession at any time.

Wells on Replevin, § 94.

The case of the mortgagor under such a chattel mortgage is quite like the case of a receiptor to the sheriff; the right to the possession is in the sheriff, the receiptor but a servant.

Dillenback vs. Jerome, 7 Cow. 294.

Bond vs. Paddleford, 13 Mass. 394.

Mayhue vs. Snell, 37 Mich. 305.

It is elementary that the master may have trespass, against a stranger who takes the goods unlawfully away from his servant.

As where a Massachusetts deputy sheriff having attached goods, carried them into Rhode Island, and delivered them to a receiptor, and

the latter put them into the hands of another person for safe keeping. It was held, that the officer might maintain trespass against strangers, who took them away from the keeper in Rhode Island.

Brownell vs. Manchester, 1 Pick. 232.

Smith vs. Milles, 1 Durn. and East. 480.

Replevin lies for any tortious taking of goods, where the right to their immediate possession is in the plaintiff.

Pangborn vs. Patridge, 7 John. 140.

A constructive possession will enable the plaintiff to maintain replevin against a stranger, who has taken the goods from his servant, by a tresspass.

Clark vs. Skinner, 20 John. 465.

Upon the second issue, upon the facts found by the court, the law will give judgement in favor of the plaintiff and against the defendant, for unlawfully taking the goods away from the custodian of them, unless the facts further found, sustain the defendants justification for the taking.

[The matter of this following III paragraph is presented, upon the possibility:

1. That this court may conclude that so much of the amended finding, beginning Record, p. 73, folio 138, and extending to Record, p. 74, folio 141, to the words "*Facts Found*" is not special finding, but *opinion*, or reasons for setting aside a former judgement and granting a new trial, and upon,

2. The certainty that the stipulation [Record, p. 62 and 63,] is no part of the special finding.]

III.

The facts pleaded by the defendant in his justification for the taking are not found by the court. The defendant is not found to have been sheriff of the county of Berrien. The issuing of the writs of attachment out of the circuit court for that county and the delivery and levy thereof on the mortgaged property and the judgements in the attachment suits are not found. See "THE FACTS FOUND." [Record, p. 74, et. seq.]

In Norris vs. Jackson, the court say, that, where a cause is tried and

determined by the court, under the 4th section of the act of March 3, 1865, the court is a substitute for a jury, and that its special finding of facts is, in effect, a special verdict; and that upon such finding the question is presented, the same as on a special verdict, whether the facts thus found require a judgement for plaintiff or defendant.

9 Wall. 125.

In Jennisons vs. Leonard, the court say, "We are authorized by the statute * * where the finding of facts is special, to review "the determination of the sufficiency of the facts found to support the judgement" and we are authorized to examine no other question."

21 Wall. 302.

And the Supreme Court of Michigan, in Adams vs. Champion say, that where the facts are required to be specially found, and part are so found, but as to certain facts essential to the judgement there is no finding, the judgment cannot be sustained.

31 Mich. 233.

8 How. 484.

Therefore, upon the finding of the facts, the court should have given a general judgement for the plaintiff, without regard to the amount of his special property in the goods and chattels, for his right to their possession would continue until payment, and the defendant had no right to qnestion the amount.

Hendrickson vs. Walker, 32 Mich. 68.

1. In finding the facts, [unless the special finding begins at Record, p. 73, folio 138,] the court does not find, even in the most general manner, any fact established on the trial before the court, that will defeat the plaintiffs right to maintain replevin.

It may, perhaps, be claimed by counsel for the defendant that the passage in the record, commencing with the words "This cause was tried at a former term of this court, by a jury, and a verdict was rendered in favor of the plaintiff" [Record, p. 73,] and ending with the words "Such being the condition of the laws of this state, as interpreted by its courts, defendant *was* entitled to judgement in his favor, and the only question *was* one of damages" [Record, p. 74], is such finding of fact. But we submit that such part, is a statement of the judge's reasons in fact and law, for having set aside the verdict of

the jury on the former trial. It seems to relate to the motion made for that purpose, and granted at a former term of the court. If so, it comes within the criticism of the court in Dickinson vs. The Planters Bank.

16 Wall. 257.

2. And, perhaps, counsel for the defendant may claim that the stipulation [Record, pp. 62-63,] is in the nature of a case stated and submitted to the court for its judgment. But a case stated contains all the ultimate facts on *both sides*, which this stipulation does not. It is in no sense like a special verdict.

Graham vs. Bayne, 18 How. 62.

It is rather an admission in writing by the plaintiff of certain facts prejudicial to his case, to be offered in evidence on the trial like any other admission. Indeed the stipulation expressly provides, "that this stipulation may be *read in evidence* in said cause *subject to any objection* that the plaintiff might make for irrelevancy, if the testimony were offered to be produced in the usual manner." [Record, p. 63, folio 109.]

This action having been tried before the court, a jury being waived, this court will not look into the evidence, as embodied in the record, but only to the facts as found by the court.

Coddington vs. Richardson, 10 Wall. 518.

IV.

If, however, the Court should be of opinion, that enough of the facts alleged by the defendant's plea and notice to sustain the judgment are found by the Court in its finding, and that such finding begins at Record, p. 73, folio 138; then we insist, the Court misapplied the law, to the facts he found.

1. It is seen from the facts pleaded that the defendant seeks to *impeach* the plaintiff's mortgage, as fraudulent against creditors of the mortgagor. The defendant does not justify, on the ground that he attached the goods "*subject* to the plaintiff's mortgage," in order to acquire a lien subsequent thereto for the benefit of the attaching creditors.

2. The finding is in these words, viz:

"I find no fraud whatever in the chattel mortgage, and that it was a valid security entitling the plaintiff to the benefit of a lien on the goods —in the amount hereinbefore found." [Record, p. 77.]

The court also found that the mortgage "authorized the mortgagee to take possession of the mortgaged property at any time when he deemed himself insecure." [Record, p. 74.]

Upon such finding of the facts by the court, under the issue made by the pleadings, judgment will follow, logically, for the plaintiff. Yet the court gave judgment for the defendant.

A. The court erred in applying to a *bona fide* chattel mortgage the law concerning fraudulent ones, and in giving judgment upon an issue that was not presented by the pleadings.

The case in the state court, Lucking vs. Wesson, 25 Mich., 443, cited by the judge as his basis for the above finding [Record, p. 73, folio 139,] was a bill in equity by an *execution* creditor, who had levied on the property, "*subject*" to a chattel mortgage, and who had *tendered to the mortgagee the full amount due him;* to be subrogated to the rights of the mortgagee, and have the mortgage assigned. We submit that the case has no application to the action of replevin.

B. In the earliest times the courts of Michigan held that "The right to seize and sell the interest of a mortgagor under legal process, exists, only when he is entitled to possession *under agreement to that effect*, and not when his possession is by permission merely."

Tannahill vs. Tuttle, 3 Mich., 104.

Of course a transfer of property by way of mortgage or otherwise, that was fraudulent as to creditors of the mortgagor, might always be attacked and overthrown, *by a judgment creditor*, by an action at law or suit in equity. No additional remedy was needed in respect to that class of mortgages.

C. At length the growth of business and increase in the number of chattel mortgage securities made necessary some provision whereby the interest of the mortgagor might be applied to the payment of his other creditors, without impairing the secured rights of the mortgagee. For that purpose the legislature of Michigan in 1861 passed an act, as follows, viz:

"When goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be *levied upon and sold* ON EXECUTION, against the person making such pledge, SUBJECT *to the lien of the mortgage or pledge existing thereon;* and the purchaser at such

sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, and on such payments or performance, or a full tender thereof, shall thereupon acquire all the right, interest and property, of which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made."

2 C. L., § 6097.

By proceeding under this statute, the *execution* creditor is enabled to acquire and to convey to the purchaser at his sale, a subsequent lien on the property, without disturbing the prior one. Such a proceeding is not hostile to the mortgagee, but friendly and subordinate.

If the judgment creditor desires to impeach and remove the mortgage as an impediment in his way, he should not proceed under this statute, but should proceed under the statute against fraudulent transfers of property.

Such being the object of the statute under consideration, to give a new and restricted remedy, the sheriff must not disregard the restriction; for it is *in consequence of the restriction alone* that he is able to levy at all; he should levy specially, and in terms, "*subject* to the lien of the mortgage." Otherwise the levy will be an unauthorized invasion of the mortgagee's right to the possession; and on principle he may resort to the action of replevin to regain it, unless prohibited by statute, which he is not.

D. The Supreme Court of Michigan have adopted a construction of the statute of 1861, quoted above, which we will now examine.

1. In cases of *execution* issued upon a judgment against the mortgagor, the officer who has acquired by his levy a subsequent lien on the property, subject to the mortgage, may take possession of the property and sell the same, *subject* to the mortgage, to satisfy his lien, by regular proceedings toward such sale, and without *unnecessary delay*. And that, *during that time*, the mortgagee cannot maintain replevin against the officer; for the reason, that each lien-holder has a right to take such lawful and *speedy* proceedings as may be necessary to obtain satisfaction of his lien.

In Cary vs. Hewitt, 26 Mich., 228, the defendant Hewitt, a constable, levied his *execution* SUBJECT to the plaintiffs' mortgage, and IMMEDIATELY gave the requisite notice of sale. The plaintiff replevied *before* the day of sale had arrived [pp. 230–231]. Upon this the court say,

"If, when a levy is made, and *before it is possible to reach a sale*, the the mortgagee may intervene under the authority conveyed to him by the debtor through the mortgage, and do as he likes with the goods, the right and benefit intended for the *execution* creditor may always be defeated. But if the officer is allowed to detain them in a convenient and safe custody under his levy, *for the time requisite to bring the property levied on to sale*, the substantial interests of all concerned will generally be promoted." [p. 235.]

And it was held that, during the time *necessary* to make the sale, the mortgagee could not maintain replevin against the officer.

In Macomber vs. Saxton, 28 Mich. 516, defendant Saxton, a deputy sheriff, seized the goods on *execution*, *subject* to the plaintiff's mortgage, and the plaintiff "*at once* dispossessed him," it was held, on the authority of Cary vs. Hewitt, that the officer was entitled to the possession "*when the suit was commenced.*" [p. 517–518.]

In Haynes vs. Leppig, 40 Mich., the court say "the officer cannot make a sale of the mortgagee's interest to any advantage unless the property can be shown to bidders." And where the mortgagee has not "actually advertised, before the levy, the sale by the officer will *usually take place* before the mortgagee can have any occasion to act at all." [pp. 606-607.]

From the foregoing cases it is seen that the officer with an *execution*, representing *judgement creditors*, may levy on the mortgagor's interest, *subject* to the mortgage, and retain the property from the mortgagee for a *sufficient* length of time, to effect a sale in the regular course of proceeding, and without *unnecessary delay*. Sales on execution speedily follow after the levy. The notice of sale is one of ten days, and he cannot sell the mortgaged stock *in parcels*. It must be sold as an *entirety*, that is, he sells the mortgagors *equity of redemption*, and this is not apportionable. Worthington vs. Hanna, 23 Mich., p. 534.

E. But a proceeding by *attachment* is altogether of a different character. An attachment is the institution of a *suit*, which will be subject to the usual incidents of delay by the parties, and of an overcrowded calendar of causes for trial, and may continue pending for years; and then the attachment plaintiff may in the end be defeated. In the meanwhile the mortgagee is not *made a party, and cannot make himself one, and cannot give bond for the property.*

F. It is settled law that a *creditor at large*, cannot impeach a mortgage of chattels for fraud. Such creditor, therefore, must attach

the mortgaged property, *subject* to the rights of the mortgagee, or he cannot attach at all. And in attaching the goods he must not abridge or destroy the mortgagees' right to their possession by virtue of the mortgage.

G. The most the attaching officer would have a right to do, would be to obtain his lien by endorsing his levy on the writ, making an appraisal and inventory, and then leave the goods alone, without further interference with the mortgagee's right to their possession, until an *execution* on the judgement should be placed in his hands. In the meantime in the event of foreclosure, protecting his levy by so bidding at the foreclosure sale, as to create a surplus. There is neither law nor reason for giving a subsequent and subordinate lien, precedence over the prior and paramount one, *a fortiori* for an unlimited time.

H. The Michigan Supreme Court have *since* this case was tried below, put the question at *rest* by decision.

In Bacon vs. Kimmel, 14 Mich. 201, which was heard at the April term, 1866, the mortgaged property had been attached in the hands of the mortgagee, after the time of payment had expired, and it was held that it was not subject to attachment in a suit against the mortgagors. [p. 206.]

In Hunt vs. Strew, 33 Mich. 86, the court lay stress on the fact, that the attached property was "never moved or disturbed by the constable until after the *execution* was levied, under the *judgment*." [p. 87.]

In King vs. Hubbell, Northwest Rep. Vol. 4 (N. S.) No. 6, the court say "there is no doubt of the right of the officer to take possession of the property *so far as may be necessary for the purposes of an inventory and appraisement.* This establishes and *perfects* his lien. * * The mortgagee, as having the first lien, and as being entitled to foreclose it at a definite time, is fairly *entitled to the possession.* * * He (the officer) must *respect* the subsequent lien in whatever he shall do in regard to the property afterwards. * *

If the officer believes the mortgage to be fraudulent or satisfied, he may then refuse to recognize it (Angier vs. Ash, 26 N. H. 99) but if *he concedes its validity*, it will not be necessary for his protection that he should retain possession. The mortgagee as having the first lien and as *being entitled to foreclose it at a definite time*, is fairly entitled to

the possession, and the sheriff should surrender it, on demand," [p. 444] * * "after his inventory and appraisal." [p. 445.] [*See Supplement to this Brief.*]

In the case at bar, no "*demand*" was necessary. The law requires no idle ceremony. The officer held the goods at his peril not "*subject to*" the mortgage lien, but *adverse* thereto, claiming the mortgage to be *fraudulent and void*.

Trudo vs. Anderson, 10 Mich. 357, 369, 370, which was replevin for a horse, disposed of by a bailee for accommodation and—rules that where one's property is disposed of, *without authority*, by the person having it in charge, the owner may bring replevin *without a previous demand*; *followed in*

LeRoy vs. East Saginaw City Railway, 18 Mich. 240. The syllabus is:

Replevin, Detinet, Demand. Under the statutes of Michigan the action is always in the *detinet*, whether taking be wrongful or not. Where the taking was wrongful, and the plaintiff establishes his right to the property, his action *cannot be defeated by a failure to make prior demand.* Such failure not going to the right of action.

The action was for property seized under tax-warrant, by collector of taxes.

Followed again in:

Ballou vs. O'Brien, 20 Mich. 324.

And in:

Whitney vs. McConnel, 29 Mich. 14.

And in:

Campbell vs. Quackenbush, 33 Mich. 288.

But limited, to cases where defendant's possession was wrongful.

That issue is found against him. He was then a trespasser and wrongdoer from the beginning, and had been such trespasser from July 15th, 1875, the date of his seizure of the mortgaged goods, to October, 19th, 1875, the date of the replevin.

Had the decision of the Supreme Court of Michigan, construing Michigan Statutes, been extant at the time of the trial the court below would have followed it, and held that replevin would lie, that the mortgagee had the right to the possession of the whole mortgaged stock—to fix the value of the mortgaged property by a fair foreclosure

and sale, and the attaching creditors, after they had judgment, could have had, in a suit on the $20,000 replevin bond, the respective rights of mortgagee and judgment creditor adjudicated and the extent of their liens settled.

ASSESSMENT OF DAMAGES—REDUCTION OF MORTGAGEE'S LIENS—SETTLING EXTENT OF ATTACHING CREDITOR'S LIEN—UNDER JUDGMENTS HAD AFTER ISSUE FORMED IN THIS CASE.

The issue, as to the right of the *possession* of the goods, and the extent of any special property or lien, in the action of Replevin, relates to "*the time of commencement of suit.*" C. L. of Mich., 1871, § 6754, Cary vs. Hewitt, 26 Mich. 228, and cases there cited.

V.

The Court, in adjusting the conflicting liens of the parties, rejected various notes covered by the mortgage. In that the judgment is not supported by the facts found. But *per contra*, the facts found show that these notes should have been allowed. The Court holds and finds as matter of fact and law:

That the amount of plaintiff's lien by the mortgage on said "mortgaged property, according to the evidence and *the laws of the State*, as interpreted by its highest Court, *at the date of the mortgage was* $4,825.36, which since the commencement of *this suit* has been reduced [by plaintiff's realizing on *another* security as herein * * stated] to $2,612.36 * * ;" adding interest makes "the amount of his lien $3,295.36 at THIS *time* (June 11th, 1878.) Which sum deducted from the value of all the (mortgaged) property, leaves the value of the goods taken by plaintiff, under his writ of replevin, *in excess of the lien*, $5,575.10. As this sum is less than the amount of the attaching creditors' claims, as established on the trial, I assess the damages in favor of defendant and against plaintiff at that sum, viz. $5,575.10." (R. p. 76 and 77 folio 148.)

ALL *the facts found* applicable to the V paragraph are as follows:

1. The amount secured to be paid by said mortgage was represented by (a) seven notes *payable to plaintiff* aggregating $4,873.34. All but $666.91 (one note) was due June 25, 1875, and that one note was due Nov. 25, 1875. (R. p. 74 f. 142.)

(b) By one note to the order of Harriet A. Stewart, past due and unpaid. May 24, 1875. $1,465.46

(c.) The Elizabeth Stewart note, $4,092.12. [Record, p. 75, folio 142.] Total, $10,430.92.

The value of the property covered by the chattel mortgage at *the time* of the commencement of this suit was $8,870.46. [Record, p. 76, folio 148.]

FOUND FREE OF FRAUD.

"I find all the notes" (with the exception of two, $1,263.43 and $250.00) "represented actual, bona fide indebtedness of the mortgagor, Charles Stewart." [Record, p. 75, folio 144.]

The Court also finds "no fraud whatever in the chattel mortgage, and that it was a *valid security entitling plaintiff* to the benefit of a lien on the goods" (then comes the error) "in the *amount* hereinbefore found." [Record, p. 77, folio 149.]

2. *As to the Elizabeth Stewart* note, the Court finds that, "plaintiff acted in good faith, and believed, as it was a valid debt of Stewart's, he might lawfully take security for its payment. There was therefore no fraud in what was done." [R. p. 75 folio 144-5.]

All the other ultimate facts as to this note are: That it was dated Jan. 1, 1873, payable to Elizabeth Stewart or or order for $3,300, with ten per cent interest, due one day after date. Before the execution of the chattel mortgage in controversy; (a) payee died intestate; (b) no intestate's administrator was appointed; (c) *all* the heirs united in an assignment of the note to one of them, Cornelia Stewart; (d) the maker and mortgagor desired to have it secured by the chattel mortgage in question; (e) it had been indorsed to plaintiff by Cornelia Stewart for collection; (f) plaintiff held the note and the heirs' assignment to Cornelia; (g) there was due on the note (May 24, 1875) $4,092.12; (h) there was some family relationship between plaintiff and Elizabeth and Cornelia Stewart, and the object of including the note as a secured debt was for the benefit of Cornelia Stewart; (i) plaintiff at the date of the chattel mortgage had received the note from Cornelia for the purpose of getting it collected or secured; (k) there was no proof in the case that Elizabeth Stewart left any creditors.

[R. p. 75, folio 142 and 143.]

The court *excluded* this claim from the lien of the chattel mortgage. [R. p. 75 folio 144.] ruling that there was *no one* (no administrator) capable of taking and holding security for its collection. That plaintiff can claim no lien on the mortgaged property for payment of the note. [R. p. 75 f 144-5.]

This reduced the original $10,430.92 lien of the mortgage to $6,340.80, and its rejection was error.

No administrator was necessary. The heirs and distributees can pass a title which shall be good as against everybody except the administrator.

Babbitt vs. Brown, 32 Vt. 438.

Taylor vs. Phillips, 30 Ia. 238.

Kilcruise vs. Shelby, 23 Miss. 161.

Reid vs. Butt, 25 Ga. 28.

3 Redfield on Wills, p. 89, § 19.

Hibbard vs. Kent. 15 N. H. 516.

Clark vs. Clay, 31 Idem. 393.

George vs. Johnson, 45 Idem. 456.

Walworth vs. Abel, 52, Pa. St. 370.

Walworth vs. Owens, 41 Ala. 217.

But if the property in the note did not pass in that way, yet the heirs had such a vested interest in the surplus of the estate, as would enable them to take security for the payment of the note, or authorize it to be taken.

Ferne vs. Pub. Adm., 3 Bradf 249.

The note came lawfully into the possession of the plaintiff for the personal representative, if one should appear. It became the plaintiff's duty to use ordinary care to prevent a loss, and this was done by taking mortgage.

The following authorities, were cited in the court below, to induce that court to rule as it did.

They will probably be cited here.

They are abstracted as follows:

Cullen vs. O'Hara, Admr., 4 *Mich.* 32.

This was Trover for gold coin, brought by *O'Hara*, Admr. of Ann O'Brien, vs. *Cullen, Defendant.*

Ann O'Brien died possessed of the gold, and it came into the possession of Cullen (a Catholic priest) after her death and before the appointment of O'Hara administrator.

Defense: That one O. died *intestate*, leaving no widow and but one child and no administration; that the gold belonged to estate of O. and defendant was guardian of child of O., and as such claimed to keep the gold.

Held, Plaintiff had best right and should recover.

Morton, Admr., vs. Preston, 18 *Mich.* 61.

This was Trover for the conversion of shares of stock brought by M., Admr. of intestate owner. M., as the widow, and the heirs had (before administration) endorsed the shares for a *sale* to be made through W. D. M., one of the heirs. W. D. M. *pledged it* for his *own debt* and the pledgee sold it. These facts becoming known, the widow took out letters of administration and *as Administrator* sued the Pledgee.

The Admr. was allowed to recover.

Gilkey vs. Hamilton, Admr., 22 *Mich.* 285, rules this question:

Whether where one interferes with the property of a deceased person and *sells* a portion thereof without right, and is afterwards appointed administrator of the estate of such deceased person, he will be estopped by his prior acts, from recovery of the property for the estate?

Answered, No.

3. The Court *rejected* the TWO NOTES OF $1,263.43 and $250.00 given by Mortgagor Stewart, to Mortgagee Wood, for past due interest on the $5,000.00 mortgage bought by Wood of Terwilliger.

In that the judgment is not supported by the facts found. *Per contra* these facts found sustain the inclusion of these two notes in Plaintiff's lien.

We re-arrange pro and con the special finding.

FINDINGS FOR ALLOWANCE OF THESE NOTES:

That Plaintiff purchased this note and mortgage (the $5,000) May 1st, 1875; mortgage then assigned to him; mortgage had never been discharged of Record. The seller always held the note and mortgage. Plaintiff had this note and mortgage with him May 25, 1875—the day he took the chattel mortgage—for which he had paid full value $5,000 and accrued interest. Some time before the chattel mortgage, Plaintiff believed the mortgage had not been paid. He took the two notes, $1,263.43 and $250, in good faith and for interest supposed to be owing and past due on this ($5,000) note and mortgage, and Stewart the mortgagor (on both mortgages) gave these notes under the impression that he owed the interest they represented; that the transaction of securing their payment was in entire good faith; there was no fraud

whatever in the chattel mortgage. * * It was a valid security entitling plaintiff to the benefit of a lien on the goods.

FINDINGS (HELD AS) JUSTIFYING REJECTION.

These rest altogether on the *recital* of *payment* of this ($5,000 note *negotiable* and its collateral mortgage Sept. 21st, 1872, *before* it was due) contained in a *copy* of a deed coming into the case under objection (1) to its competency to be admitted as evidence and (2) to its relevancy and materiality, if admitted; either of which objections if sustained by this Court takes from the rejection of these interest notes all shadow of justification.

Sept. 21st, 1872. The chattel mortgagor conveyed by W. D. to the *then* holder of the $5,000 note and mortgage *an undivided* ½ of Chicago lands. The deed was recorded Oct. 19th, 1872, in Cook County, Illinois. It had this recital: "For and in consideration of the sum of $5,000, *which is paid by way of the release of a mortgage for that sum*, recorded in Liber No. 4 of mortgages in the office of the Register of Deeds for Berrien County, page 105." That prior to May 25th, 1875, (the date of the chattel mortgage) plaintiff Wood, the chattel mortgagee, *understood* that Terwilliger, the seller to him of the $5,000 note and mortgage who was also grantee in the Chicago deed—"claimed to own an interest in said Chicago lands, in common with Stewart,"—the mortgager in both chattel and real estate mortgage and grantor of the Chicago deed.

That May 27th, 1875, Stewart executed *another* deed of an undivided ½ of Chicago lands, which he delivered to Plaintiff Wood for Terwilliger.

Findings which qualify and limits those last above given.

Unless this evidence *tended* to show a *delivery* of the *first* Chicago deed to Terwilliger, and a *knowledge*, acquiescence and acceptance of its *recording*, there was *no* evidence of such delivery of deed and knowledge of its record.

AGAIN, *the Court finds:*

There is some confusion about the facts; whether the mortgage debt *was understood* by Stewart and Terwilliger (mortgagor and mortgagee) as having been paid. On the whole evidence it should be regarded paid, AS TO CREDITORS.

Therefore plaintiff can claim nothing by way of lien for security AS AGAINST CREDITORS of Stewart.

It is submitted: That these notes for $1,263.43 and $250 ought not to have been *excluded*.

4. *Apply the same method* [as in paragraph 3. ante] to the two notes, for $800 and $1,890, also by the Court *excluded*.

FINDINGS FOR ALLOWANCE

I find the amount secured to be paid by said mortgage represented by seven notes (these two included with the seven and described). * * They represented actual bona fide indebtedness of the mortgagor. * * No fraud whatever in the mortgage. * * It was a valid security entitling plaintiff to benefit of lien on the goods. These notes were due *to* Wood.

FINDINGS FOR DISALLOWANCE.

SINCE *the commencement* of this suit plaintiff has realized from OTHER securities (other than the chattel mortgage) (a) which he held to secure the PRINCIPAL *and interest* of the debt, the past due *interest* of which *principal*, these two notes (and chattel mortgage) were given to secure, (b) enough to pay them, (c) less $477. *Hence* he has lien only for the $477.

1. Why, in *this* suit, the doings of Wood, *since* its commencement with securities [*other* than the chattel mortgage in question] he held from Stewart, should be inspected and tried? Or.

2. If inspected and tried. Why monies realized from these other securities should be applied in *this* case to pay past due *interest* and cancel pro tanto *this* chattel mortgage, rather than to pay the principal, out of which the past due interest grew, there being no application or request for application, by the *debtor*, of the principal, (secured by *one* security) and of the interest, (secured by *two* securities).

The state of facts "at the commencement of the suit" both by the Michigan statute, and general practice, govern.

Belden vs. Laing, 8 Mich. 500.

Clark vs. West, 23 Mich. 242.

Cary vs. Hewitt, 26 Mich. 228.

VI.

The Court erred in the trial in overruling the plaintiff's objection to the introducing in evidence by the defendant of the transcript of the

deed, Exhibit 6, and in receiving the same in evidence against the plaintiff's objections, to which ruling the plaintiff excepted.

Rec. pp. 81-83.

The evidence, if competent, was to a material issue. The transcript should have been excluded as not having been properly authenticated.

The deed [Rec. p. 81, Exhibit 6] purports to be in consideration of a release of the mortgage [Rec. p. 79] securing the note for $5,000.00 [Rec. p. 78] which was assigned, *bona fide*, to the plaintiff, May 1, 1875 [Rec. p. 76].

The deed was recorded in the Recorder's office for Cook County, Illinois, October 19, 1872, [Rec. p. 83] and such making and recording were at no time known to the grantee, Terwilliger, or the plaintiff [Rec. p. 76].

The purpose for which the defendant offered the transcript of the deed, recorded October 19, 1872, was to show a discharge of the mortgage (which has been assigned to the plaintiff) by payment in land of the $5,000.00 note secured thereby.

The plaintiff objected to the introduction of the transcript in evidence, upon the ground that it was incompetent [Rec. p. 83] That objection was well taken, because the attestation of the Recorder of Deeds for the county of Cook, in the State of Illinois, of the correctness of the transcript, was not certified to be in due form and by the proper officer, as required by the Act of Congress of March 27th, 1804, prescribing the mode in which the public records in each state shall be authenticated, so as to take effect in every other state. [Rec. p. 83.]

The court found that "*the mortgage had never been discharged of record otherwise than by recording said deed, October* 19, 1872." [Rec. p. 76.]

The Court overruled the objection, received the transcript as evidence, and thereupon found the fact to be that, as to the creditors of Stewart, the mortgage debt of $5,000.00 was paid [Rec. p. 76], and that two of the notes secured by the plaintiff's chattel mortgage for $1,263.43 and $250.00 [Rec. p. 76 (top)] were given for the "past due interest" on the $5,000.00 one, and were without consideration. And thereby diminished the plaintiff's lien to the extent of those two notes. [Rec. p. 76].

The objection was also taken that the deed was irrelevant and immaterial.

VII.

As to the relevancy and materiality of the copy of the deed of Sept. 21, 1872, it was not material, unless *delivered* to and *accepted* by Terwilliger, or unless recorded with his knowledge or assent, equivalent to delivery and acceptance.

The *only* evidence of that is, that the plaintiff Wood (not Terwilliger) *understood* that he, Terwilliger, "claimed to own an interest in the lands in the deed described, in common with the grantor;" and as agent for Terwilliger, two days after the chattel mortgage, May 27, 1875, he took a deed, [of the grantor in the deed in question], to Terwilliger for an undivided ½ of the lands in the first deed described. Does *that* render the evidence material?

It is clear, therefore, that upon the whole case great injustice has been done the plaintiff, and the judgment should be reversed, and a new trial ordered.

L. D. NORRIS,
Of Counsel for Plaintiff in Error.

ASSIGNED ERRORS.

The counsel for Plaintiff in Error insists that the final judgment herein is erroneous and not supported by the ultimate facts found, in these particulars:

I.

In the conclusion that Replevin will not lie for the plaintiff.

II.

In the conclusion that the *defendant* was entitled to judgment, and that the amount of his damages was the *only* question.

III.

In the conclusion that marshalled and adjudged the liens of the plaintiff—a good faith mortgagee for value and without fraud and with priority—and the asserted liens of a Sheriff under attachment writs levied adverse to the mortgage, which was charged to be fraudulent and found to be honest.

1. And that marshalled these [liens of the mortgagee] not as they existed "*at the time of the commencement of suit*" (Replevin) but as found to have been reduced—*since* such commencement—out of *other* securities.

IV.

In the conclusion that held the Plaintiff in *Replevin* to account to attachment writs, for the value of the goods [$8,870.46] found by the Court *at the time of the commencement of suit* (Oct. 11th,1875) (R. p. 76, f. 148). By his mortgage, plaintiff had a right to determine that value, by foreclosure sale.

V.

In the conclusion that plaintiff's lien or special property in the chattel mortgaged stock was only $2,612.36; rejecting

(a)	The Elizabeth Stewart note, - -	$4,092 12
(b)	The interest notes of - - -	1,263 43
		250 00

1. And herein, deciding that these last named interest notes should be regarded as paid—as to (these attaching) creditors, without finding as an ultimate fact, that they *were* paid, or that they were *regarded* as paid, between payor and payee.

2. In deciding that Plaintiff could not legally take security for the first above note.

VI.

In the conclusion, rejecting from the Plaintiff's chattel mortgage debts and liens, the interest notes for $1,890.00 and $800.00, less $477.00 solely upon a finding of facts that covered only:

1. The debt and credit transactions of Plaintiff and (a stranger to this suit)—the chattel mortgagor—*since* the commencement of the issue in the suit, and that, too, touching a security and debt *other* than the chattel mortgage one in controversy, and which finding

2. Applied amounts realized by the Plaintiff from securities which he held for the payment of a *debt* (*other* than the chattel mortgage debt) to reduce and pro tanto discharge, *another* security (the chattel mortgage in controversy) which he held for the unpaid and overdue *interest* on that other debt.

The Plaintiff had a right to apply the amount realized, from a security for a debt and interest, to reduce the *debt* secured by that security. The Court applied it, in reduction and pro tanto discharge of another security, for *interest only*, and thereby took away Plaintiff's right of application—the debtor not directing its application, if he could.

VI.

The Court erred in overruling Plaintiff in Error's objection of incompetency, irrelevancy and immateriality to the deed of Chas. Stewart and wife to Abram Terwilliger, of date Sept. 21st, 1872, (R. p. 77, f. 149, and p. 81 to 83, f. 165.

There was exception, the benefit of which was saved, and *settled* (R. p. 77, f. 149).

The incompetency was in the certifying of the Record by the Recorder (R. p. 83, f. 165). The irrelevancy and immateriality is shown in this finding: "That there was no other evidence" (which is a finding that there was no evidence) "tending to show that this deed from Stewart to Terwilliger of Sept. 21st, 1872, was *ever delivered* to Terwilliger, or that he *knew* of its being *recorded*," or ever *heard* its *recitals*.

In this connection may be noted the exception to the exclusion of testimony offered (R. p. 84, f. 166–167) giving the statements of Stewart and Terwilliger to Wood in explanation of the *recital* in said deed

of payment by mortgage discharge. As such explanation (in the light of the *findings*) is now shown to have been *post litem motam*, error is not assigned nor exception pressed.

L. D. NORRIS,
Of Counsel for Wood, Plaintiff in Error.

SUPPLEMENT TO BRIEF.

Since this brief was in type, the original Return was found deficient, in that the following stipulation was *omitted:*

Not deeming it absolutely essential for Plaintiff in Error to appear in this Court, allege diminution, and sue out writ of certiorari. The Court below ordered it certified as additional return, omitted by oversight of clerk.

The last paragraph, printed in brackets and leaded, admits the fact *of demand before Replevin suit brought,* and if considered by the Court, brings Plaintiff in Error *altogether within* the Rule of the State Court [followed in U. S. Courts] in its interpretation of the State Statute, authorizing levies on mortgagor's interest in chattel mortgaged goods.

See *ante* pp——

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.

James M. Wood
vs.
Joseph W. Weimar.

On the part and behalf of the Plaintiff it is stipulated that the following facts are true, and so may be taken and received at the trial of the cause at this present term thereof, but subject to any objection that the defendant might make for irrelevancy, if the testimony were offered to be proved in the usual manner.

First. That on the 25th day of May, A. D. 1875, the chattel mortgage marked "A" was given by Charles Stewart to James M. Wood, the plaintiff herein, and on the same 25th day of May, A. D. 1875, the said chattel mortgage was filed in the office of the township clerk of the township of St. Joseph, in Berrien county, Michigan, in which township of St. Joseph said Charles Stewart before and on said 25th day of May, A.D. 1875, resided, and there since and until and now resides, and which chattel mortgage so remained on file in said township clerk's office until the 29th day of May, A. D. 1876, when it was taken from the files to be used as evidence in this cause.

Second. That on the 15th day of July, A. D. 1875, the defendant, Joseph W. Weimar, seized and took into his possession the goods in question in this suit, and kept and detained the same away from the Plaintiff, until the same were taken from said Joseph W. Weimar by the writ of Replevin issued in this cause. That all of the said goods so taken by the defendant, and which are in controversy in this cause, were included in and were of the goods and property referred to and included in said chattel mortgage.

[*Third.* That on the 11th day of October, A. D. 1875, and shortly

before the commencement of this suit, the Plaintiff in due form demanded from the defendant, that he surrender and deliver to this Plaintiff all of the aforesaid goods and chattels, in this cause in controversy and included in said chattel mortgage, but the defendant then and there refused to deliver the same, and so continued to refuse to do, up to and at the time of the commencement of this action and the taking of the such goods by the writ in this cause.]

Dated May 31st, 1876.

GEO. S. CLAPP,
Attorney for Plaintiff.
N. A. HAMILTON,
Attorney for Defendant.

Stipulation filed June 12th, 1876.

CHESTER B. HINSDILL, Clerk.

United States of America,
Western District of Michigan,
Southern Division. } s. s.

I, Henry M. Hinsdill, clerk of the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division, do hereby certify that the foregoing and attached paper is a true and compared copy of an original stipulation, dated May 31st, 1876, signed by the attorneys of the respective parties, and filed in this court and cause on the 12th day of June, 1876, and of the whole thereof. And I further certify that when the transcript and return to the writ of Error in this cause was made up, on the 10th day of October, 1878, by a former deputy clerk, this stipulation was omitted; and that the attention of the clerk of this Court being called to such omission by the counsel for the plaintiff, Wood, the Court ordered this supplementary return to be made and forwarded to the clerk of the Supreme Court at Washington.

Witness my hand and the seal of said Court this, 29th day of March, A. D. 1881, at Grand Rapids, Michigan.

HENRY M. HINSDILL,
Clerk of the Circuit Court of the United States for the Sixth Circuit and Western District, Michigan.

Seal
C. C. U. S.,
6th C. and W. D.
of Mich. S. D.

SUPREME COURT, U.S.
FILED
FEB 18 1881
JAMES H. MCKENNEY, CLERK

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

OCTOBER TERM, 1880. No. 329.

JAMES M. WOOD, - - - - - - *Plaintiff in Error*,

vs.

JOSEPH W. WEIMER, - - - - - *Defendant in Error*.

BRIEF FOR DEFENDANT IN ERROR.

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

JAMES M. WOOD, - - - - - *Plaintiff in Error,*

vs.

JOSEPH W. WEIMER, - - - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This suit is a contest between the mortgagee of a stock of hardware and attaching creditors.

Joseph W. Weimer, the Sheriff representing the attaching creditors, insists—

1st. That James M. Wood, the mortgagee, cannot maintain replevin.

2d. That, under the statutes of Michigan for filing and renewing chattel mortgages, the chattel mortgage to James M. Wood is absolutely void as against creditors.

3d. That the chattel mortgage is void by reason of fraud in law.

4th. That, if the chattel mortgage were not void against creditors, it can have no priority as against the creditors in this suit.

5th. If the chattel mortgage was valid and had priority, James M. Wood could in this action have judgment for no more than was really due and unpaid to him at the time of render ing judgment, which the Circuit Judge finds to be $2612.36.

Trial by jury was duly waived, (69).

There was a request for special findings, (70).

Findings were made and filed accordingly, (73).

No conclusion of law in the findings was excepted to.

There is no bill of exceptions.

Exhibit 6 annexed to the finding (77) (81) (84) states two exceptions taken on the trial to the rulings in relation to the admission of certain evidence without anything to show what other evidence concerning the same matters was before the court at the time the rulings were excepted to or afterwards.

There is no assignment of errors.

Charles Stewart, the mortgagor and general owner of the property, replevied, is not a party to this suit.

The parties are mere lien holders. Every fact to fix the nature and extent of the lien held by Joseph W. Weimer, as Sheriff, is admitted and agreed upon in the stipulation duly filed (62) and established in the finding by the Judge (73). A return of the property replevied was waived and the defendant filed his election to recover money. (64).

On the 25th day of May, 1875, Charles Stewart had in a store in the village of St. Joseph, Berrien county, in the Western District of Michigan, a stock of hardware (76). He was selling in usual course of business as a retail dealer.

He was insolvent.

James M. Wood, of Gloversville, New York, a friend or relative of Charles Stewart took from him on the day last mentioned, the chattel mortgage, exhibit 1 (77), and caused it to be filed in the office of the Town Clerk, but left Stewart in possession selling in the usual course of business, and he so continued until the attachments, July 15, 1875, were served and Joseph W. Weimer, Sheriff of Berrien county, took possession of the stock. (62).

The Sheriff held possession under his writs until Oct. 19th, 1875, when James M. Wood replevied the property attached which was then worth $8870.46.

The only condition of the mortgage was for payment of the mortgage on or before November 25, 1875.

On the 8th day of February, 1876, the atttaching creditors obtained the judgments set forth in satisfaction of debts due prior to the chattel mortgage. (62–63–73).

The last trial in this suit was Sept. 14th, 1877. (74.)

The chattel mortgage was never renewed by the filing of any affidavit to show the amount unpaid or the extent of the mortgagee's interest in the mortgaged property.

ARGUMENT.

I.

James M. Wood never had any cause of action in replevin against Joseph W. Weimer.

The statutes of Michigan in force in 1875, as construed by the State Supreme Court, authorized the services of the attachments and all that Joseph W. Weimer, the Sheriff, did thereunder.

Compiled laws of 1871, sec. 6097—"When goods or chattels shall be pledged by way of mortgage or otherwise for the payment of money or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon, and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge at any time before the actual foreclosure of such mortgage or pledge, and on such payments or performance, or a full tender thereof, shall thereupon acquire all the right, interest and property of which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made.',

Construed.

Cary v. Hewitt, 26 Mich., 229.
The People for the use of Farrington v. Bristol et al, 35 Mich., p. 28.
Hunt v. Shaw, 33 Mich., 89.
Haynes v. Lippig, 40 Mich., 607.
Baxter v. Smith, 41 Mich., 139.

There was no breach in any of the conditions of the chattel mortgage until after all the attachments and the replevin.

The mortgagor was in possession, selling as owner at the service of the attachments.

The finding shows no demand of the property replevied. (74).

A demand ought to have preceded this action.

Caldwell v. Pray, 41 Mich., 312.

There is no exception to the finding (74) in effect that this action cannot be maintained, and that Joseph W. Weimer is entitled to a judgment in his favor, and that the only question is one of damages.

James M. Wood must be deemed to have waived any objection to the finding that this action cannot be maintained.

Compiled laws 1871, sec. 6031:

"Any party aggrieved by any opinion, direction or judgment of any Circuit Court in any civil suit or action may allege exceptions thereto in writ-

ing at the time such opinion or direction is given or such judgment pronounced, or if such exception be to the charge given to the jury, it shall be made before the jury shall have delivered their verdict."

Michigan Circuit Court rule, 89:—"Within four days after the filing of such completed finding or such other time as may be allowed by the court any party aggrieved may briefly in writing allege exceptions to the matters of law embodied in such finding and such exceptions shall be thereafter put in form and settled in the same bill, which may contain the exceptions taken during the trial and in the same manner with bills of exceptions in other cases."

Fellen v. Green, 26 Mich., p. 70.
Peabody v. McAvoy, 23 Mich., 527.
McMillian v. The Gilt Edge Cheese Factory, 23 Mich., 545.
Section 700 R. S. of U. S., 1871.

II.

The statutes of Michigan for filing chattel mortgages make the chattel mortgage to James M. Wood absolutely void as against the attaching creditors.

Compiled laws 1871, sec. 4706:—"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a non-resident of the State, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township or city clerk of the city, or city recorder of cities having no officer known as city clerk where the property is."

If the chattel mortgage was not legally filed no consideration, notice or honesty of hurpose can save it.

Cooper v. Brock, 41 Mich., p. 491.
Frink v. Minner, 50 Ill., 444.
Benedict v. Smith, 10 Pa., 126.
Thompson v. Van Vechten, 27 N. Y., 566.
Stevens v. Buffalo N. Y. R. R. Co., 31, Barb 590.
Bloom v. Noggle, 4 Ohio State, p. 54.

The document filed as a chattel mortgage must show the truth and not fiction in all that is material for creditors to know, for otherwise the statute must be useless.

Hinchman v. Town, 10 Mich., 508.
In Re. Southam, 9 Eng. Rpts., 659.
Ely v. Comley, 19 N. Y., 496.
Blakesley v. Roseman, 43 Wis., 123.
Hart v. Chalkler, 14 Conn., 77.
Jewett v. Preston, 27 Maine, 400.

The chattel mortgage to James M. Wood instead of stating [illegible] a cover to hide the truth. The finding (73) shows that the mortg[illegible] the following false pretenses:

That Charles Stewert was justly indebted to James M. Wood in t[illegible] of $10,465.46; whereas there was such indebtedness for half this sum. Charles Stewart did, in May, 1875, in consideration of such indebtedne[illegible] contract to pay said sum with interest on or before November 25th, 1875, whereas no such contract ever existed except as a matter of form.

There was no consideration for any such contract and the notes which the mortgage secured differed much from the mortgage in date, maturity, rate of interest and party payee. The notes all remained in full force unextended in time and in no way referred to in the mortgage.

The finding shows that the mortgage hides the secret trust in favor of Cornelia Stewart and Harriet Stewart, amounting to more than half the pretended consideration and mortgage debt—James M. Wood taking upon himself these trusts, giving no consideration, making no promise and assuming no debt.

The finding shows that the chattel mortgage hides from ordinary creditors the trust that Charles Stewart was to continue selling the goods after the mortgage as before. All direct mention of such trust being suppressed.

The intent of the statute for filing chattel mortgages was to give a constructive notice to all whom it might concern of the true contract secured by any chattel mortgage.

If the statute had required the mortgagee to give true written notice of his claim to the sheriff serving the attachments the case would be very plain had such actual notice been no nearer to the truth than the constructive notice by the chattel mortgage appearing on file.

It cannot be possible that the untruth of the constructive notice must be deemed less in legal effect than would have been the untruth of the actual notice.

As against the attachments the constructive notice [illegible] chattel mortgage dependant on the filing ought [illegible] hol[illegible] bill in equity to foreclose this mortgage according to [illegible] offered in evidence in this suit could under such bill, [illegible] as confessed; be legally put in evidence, but under such bill these notes could not be received.

McCabe v. Farnsworth, 27 Mich., 53.

The chattel mortgage implies that there were no collareral notes.

Giddey v. Uhl, 27 Mich., 96–7.
In Re. Southam, 9 English Rep., 659.
Ely v. Cornly, 19 N. Y., 496.
In this connection also:
Leavenworth v. Hunt, 11 Wallace, 394.
22 Wall, 514.

If the chattel mortgage does not truly state the contract it secures it is void and against creditors.

Stearns v. Herman, 23 Wis., 135.
Driver v. McLaughlin, 2 Wend, 596.
Bailey v. Burton, 8 Wend, 338.
Sheppardson v. Whipple, 107 Mass., 279.

ing at the time such opinion or direction is given or such judgment pronounced, or if such exception be to the charge given to the jury, it shall be made before the jury shall have delivered their verdict."

Michigan Circuit Court rule, 89:—"Within four days after the filing of such completed finding or such other time as may be allowed by the court any party aggrieved may briefly in writing allege exceptions to the matters of law embodied in such finding and such exceptions shall be thereafter put in form and settled in the same bill, which may contain the exceptions taken during the trial and in the same manner with bills of exceptions in other cases."

Fellen v. Green, 26 Mich., p. 70.
Peabody v. McAvoy, 23 Mich., 527.
McMillian v. The Gilt Edge Cheese Factory, 23 Mich., 545.
Section 700 R. S. of U. S., 1871.

II.

The statutes of Michigan for filing chattel mortgages make the chattel mortgage to James M. Wood absolutely void as against the attaching creditors.

Compiled laws 1871, sec. 4706:—"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the township clerk, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides, except when the mortgagor is a non-resident of the State, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk of the township or city clerk of the city, or city recorder of cities having no officer known as city clerk where the property is."

If the chattel mortgage was not legally filed no consideration, notice or honesty of hurpose can save it.

Cooper v. Brock, 41 Mich., p. 491.
Frink v. Minner, 50 Ill., 444.
Benedict v. Smith, 10 Pa., 126.
Thompson v. Van Vechten, 27 N. Y., 566.
Stevens v. Buffalo N. Y. R. R. Co., 31, Barb 590.
Bloom v. Noggle, 4 Ohio State, p. 54.

The document filed as a chattel mortgage must show the truth and not fiction in all that is material for creditors to know, for otherwise the statute must be useless.

Hinchman v. Town, 10 Mich., 508.
In Re. Southam, 9 Eng. Rpts., 659.
Ely v. Comley, 19 N. Y., 496.
Blakesley v. Roseman, 43 Wis., 123.
Hart v. Chalkler, 14 Conn., 77.
Jewett v. Preston, 27 Maine, 400.

The chattel mortgage to James M. Wood instead of stating the truth, is a cover to hide the truth. The finding (73) shows that the mortgage contains the following false pretenses:

That Charles Stewert was justly indebted to James M. Wood in the sum of $10,465.46; whereas there was no such indebtedness for half this sum. That Charles Stewart did, in May, 1875, in consideration of such indebtedness, contract to pay said sum with interest on or before November 25th, 1875, whereas no such contract ever existed except as a matter of form.

There was no consideration for any such contract and the notes which the mortgage secured differed much from the mortgage in date, maturity, rate of interest and party payee. The notes all remained in full force unextended in time and in no way referred to in the mortgage.

The finding shows that the mortgage hides the secret trust in favor of Cornelia Stewart and Harriet Stewart, amounting to more than half the pretended consideration and mortgage debt—James M. Wood taking upon himself these trusts, giving no consideration, making no promise and assuming no debt.

The finding shows that the chattel mortgage hides from ordinary creditors the trust that Charles Stewart was to continue selling the goods after the mortgage as before. All direct mention of such trust being suppressed.

The intent of the statute for filing chattel mortgages was to give a constructive notice to all whom it might concern of the true contract secured by any chattel mortgage.

If the statute had required the mortgagee to give true written notice of his claim to the sheriff serving the attachments the case would be very plain had such actual notice been no nearer to the truth than the constructive notice by the chattel mortgage appearing on file.

It cannot be possible that the untruth of the constructive notice must be deemed less in legal effect than would have been the untruth of the actual notice.

As against the attachments the constructive notice and the lien of the chattel mortgage dependant on the filing ought to hold good, unless on a bill in equity to foreclose this mortgage according to its terms, the notes offered in evidence in this suit could under such bill, taken as confessed, be legally put in evidence, but under such bill these notes could not be received.

McCabe v. Farnsworth, 27 Mich., 53.

The chattel mortgage implies that there were no collareral notes.

Giddey v. Uhl, 27 Mich., 96–7.
In Re. Southam, 9 English Rep., 659.
Ely v. Cornly, 19 N. Y., 496.
In this connection also:
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If the chattel mortgage does not truly state the contract it secures it is void and against creditors.

Stearns v. Herman, 23 Wis., 135.
Driver v. McLaughlin, 2 Wend, 596.
Bailey v. Burton, 8 Wend, 338.
Sheppardson v. Whipple, 107 Mass., 279.

The decisions of the U. S. Supreme Court allowing various contracts to be proven under the recital of a sum of money in a mortgage expressly except intervening rights, such as those of creditors.

Shiras v. Craig, 7 Cranch, 34.
Lawrence v. Tucker, 23 Howard, 34.

Parol evidence cannot as against attaching creditors cause the chattel mortgage to cover debts which as filed it does not appear to cover.

Bailey v. Burton, 8 Wend, 339.
Lee v. Hunter, 1 Paige, 519.
Orang Co. v. Frink, 7 Paige, 87.
McEwen v. Ortman, 34 Mich., 324.
Case v. Windship, 4 Black, 426.
Robbins v. Perkins, 3 Met. Mass, 177.
Adair v. Adair, 5 Mich., 205.

Some of the above mentioned decisions relate to real estate mortgages, but apply with increase of force to chattel mortgages, which as against creditors, are by statute declared absolutely void unless they are legally filed.

If it should be held that, under Michigan decisions, the chattel mortgage was not fraudulent in law by reason of the trusts, the application of the statute for filing chattel mortgages must be considered, and the secret trusts remain in all their magnitude a part of the real transaction.

The finding shows that more than half the principal of the pretended mortgage debt was secured to James M. Wood as a naked trustee, without any claim of right beyond that he might take possession of the property mentioned in the mortgage and dispose of it to pay the preferred creditors in the Stewart family "the overplus if any to belong to and be returned to Charles Stewart." (78).

This trust was in effect an unlawful assignment of a part of Charles Stewart's property to pay a part of his debts without any contract from James M. Wood for the execution of the trust.

This trust was not only hidden by the chattel mortgage, but was repugnant to its terms and yet made more than half the alleged consideration and debt referred to in the mortgage.

Harkrider et al v. Leiby, 4 Ohio State, at pages 610 and 611.
Bloom v. Noggle, 4 Ohio, at p. 56.
Perry v. Holden, 27 Pick, 269.
Goodrich v. Davis, 6 Hill, 438.
Smith v. Post, 1 Hun. N. Y., 516.
Pearson v. Manning, 2 Mich., 445.
Smith v. Mitchell, 12 Mich., 59.

No Michigan decision which can be cited on behalf of the plaintiff in error will go so far as to decide that as against attaching creditors the statute requiring the filing of chattel mortgages is satisfied by the filing of this mortgage, which suppresses all direct mention of the trust in favor of

Charles Stewart himself and all mention, express or implied, of the great trust in favor of the other Stewarts.

III.

If at any time the chattel mortgage was entirely valid and had all the priority claimed for it such priority has been lost, and the lien of the chattel mortgage ought to be postponed to that of the attachments.

The execution of the trust that Stewart was to remain selling the mortgaged goods certainly superceded and did away with so much of the alleged chattel mortgage as was an assignment for the benefit of preferred creditors.

Craig v. Bradley, 26 Mich., 359.
Flanigan v. Lampman, 12 Mich., 59.

The finding shows that Charles Stewart (no party to this suit) is the general owner of the property replevied, and that James M. Wood and Joseph W. Weimer are only lien holders, neither lien securing a sum as great as the value of the property. The whole case is within the Michigan statute.

C. L. of 1871, sec. 6754: "When either of the parties to an action of replevin at the time of the commencement of the suit shall have only a lien upon or special property or part ownership in, the goods and chattels described in the writ and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages in all cases arising under this chapter and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

The late decisions of the Supreme Court of the State of Michigan, under the statutes in force in 1875, declare that the mortgagé of personal property can never, prior to perfect foreclosure by public sale, have any rights beyond those of a lien holder.

Caldwell v. Pray, 41 Mich., 312.
Brink v. Freoff, 40 Mich., 613.
The People v. Bristol, 35 Mich., 28.
Kohl v. Lynn, 34 Mich., 361.
Lucking v. Wesson, 25 Mich., 445.
Brong v. Brown, 42 Mich.

Under section 6754 above given the court in forming the judgment in this suit acts with equity powers and is to find the amount really due at the time of the trial, and is to consider all material facts and circumstances after the commencement of the action of replevin.

Fowler v. Hoffman, 31 Mich., 221.
Wheeler v. Fracy, 4 Pick, 168.
Davis v. Hareting, 3 Allen, 303.
Whilwell v. Wells, 24 Pick, 33.
Place v. Grant, 9 Mich., 44.
Kohl v. Lynn, 34 Mich., 360.
Booth v. Ableman, 20 Wis., 21.

Lenord v. Whitney, 109 Mass., 266.
Kale v. Connetty, 16 Ala., 271.
Thompson v. Van Vechten, 27 N. Y., 568.
Wells on Replevin, sec. 589.

James M. Wood never had any public sale, never foreclosed his chattel mortgage and never renewed it by filing attached thereto any affidavit as required in the C. L. of Michigan, sec. 4709, as follows:

"Every such mortgag shall cease to be valid as against the creditors of the person making the same or subsequent purchasers and mortgagees in good faith, after the expiration of one year from the filing of the same or a copy thereof, unless within thirty days next preceding the expiration of the year the mortgagee, his agent or attorney, shall make and annex to the instrument, or copy on file as aforesaid, an affidavit setting forth the interest which the mortgagee has by virtue of said mortgage in the property therein mentioned, upon which affidavit the township or city clerk shall endorse the time when the same was filed. Provided, that such affidavit being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received or lien obtained thereon, in good faith, shall be as valid to continue in effect such mortgage as if the same were made and filed within the period above provided."

James M. Wood may have been advised that the action of replevin with its replevin bond relieved him from all necessity of renewal. The Supreme Court of Michigan has construed the statute to the contrary. Briggs v. Mette, 42 Mich., decided Oct. 28th, 1879, North Western Reporter, vol. 3d, No. 2, (page 231) as follows:

"ERROR TO WAYNE:
Henry M. Cheever, for Plaintiff in Error.
Lucius H. Collins and Fred A. Baker, for Defendant in Error.
Graves, J.

"By the terms of a lease from Waldo M. Johnson to Sarah Cheney, executed by both parties October 1, 1876, Mrs. Cheney covenanted to pay Johnson $1,940 rent in advance, payments at the rate of $53 per month, from October 1, 1876, to May 1, 1877, and at the rate of $61.33 per month from May 1, 1877, to May 1, 1878, and at the rate of $69.67 from May 1, 1878, to May 1, 1879.

"The instrument embraced a clause by which Mrs. Cheney mortgaged to Johnson her personal property on the premises to secure these payments, and was duly filed as a chattel mortgage, January 8, 1877.

"Subsequently and on the eighth of September, in the same year, Mrs. Cheney gave her mortgage to Catharine Briggs, on the same property, for $600, payable in ten months, with interest at ten per cent. This was filed.

"January 3, 1878, Johnson filed an affidavit to renew his security for another year.

"July 8, 1878, Mette, acting on behalf of Johnson, took possession of the property and Mrs. Briggs replevied it the thirteenth.

"The court found against her and she alleges error. Her counsel claims that Johnson's renewal affidavit was not in compliance with the statute and that his mortgage consequently ceased to be valid as against her. Sec. 4709 C. L. On the other hand it is contended that the affidavit was good, but even if it were not that the defect gave no advantage to Mrs. Briggs. In taking the

last position reliance is placed on certain decisions in the State of New York where the courts have ruled, on a statute resembling our own, that an omission to renew a chattel mortgage does not effect its force against purchasers or mortgagees, intermediate the original filing and the time prescribed for renewing, and under this ruling, as will be observed, it would be immaterial whether Johnson's renewed affidavit was good or bad. Without dwelling on the distinction between our statute and that of New York, which is somewhat marked, the opinion is held by the other members of the court that the reasoning of the New York cases is not apposite or agreeable to the view which has prevailed here, not only with the business public but with the bench and bar. They feel clear that it is the sense of the provision that annual renewals are to be made in case of an existing mortgage, not only for the information of the general creditors of the mortgagor, but quite as much for the information of those who may have become purchasers or mortgagees in good faith during the vigor of the earlier mortgage.

"The case then depends upon the sufficiency of Johnson's renewal affidavit, and in regard to that we have no doubt.

"The statute repuires the affidavit to set forth the interest which the mortgagee has by virtue of the mortgage in the property therein mentioned, and the affidavit filed set up 'that there is due and remaining unpaid on said mortgage the conditions as mentioned in said chattel mortgage lease that his interests in the chattels therein described remain unchanged and are hereby renewed for the amount above written.'

"The lease contained various stipulations to be observed by the lessee, and which were secured by the mortgage clause, and the term had still some time to run, and no one by inspecting the instrument put on file could gather whether the lessee had observed the covenants or not, or whether any rent remained due or not. The affidavit was ambiguous. It gave no explanation as to the real state of things. No one desiring to redeem could ascertain from it what amount would be be necessary. The sum the mortgagee was entitled to call for was not made known. It may have been five dollars or it may have been five hundred, and it would be difficult to base any certain charge of false swearing upon it. If it were supposed, as it is not, to be dishonest. We are satisfied it failed to convey any such distinct information as the statute required.

It follows from this that the court erred in giving judgment for the return of the property, and as the court found the value to be less than the claim of Mrs. Briggs the judgment must be reversed and one entered in her favor, with costs of both courts." (The other Justices concurred.)

These are plain reasons why James M. Wood ought to have had a public sale or ought to have filed his affidavit of renewal each year, after the date of the chattel mortgage and prior to the last trial in this suit.

He was only a lien holder. He could not increase the amount due on his mortgage by any action of replevin or replevin bond.

By omission to have the public sale he is chargeable with the full value of the mortgaged property replevied.

Davis v. Rider, 5 Mich., 423.
Brong v. Brown, 42 Mich., page ——.

By no possibility could James M. Wood recover in this action more than so much money as the court would find to be sufficient to extinguish his lien.

If Charles Stewart, the mortgagor, or any creditor succeeding to his rights, had paid and extinguished the mortgage before the trial no court acting under the statute would by judgment compel the payment of the same money for the second time to extinguish the same lien.

The right to show the expiration of the plaintiff's title after the commencement of an action of replevin is necessary to justice.

Lenord v. Whitney, 109 Mass., 266.

The right of the defendant on the trial in this cause to prove that the mortgege was paid or discharged is as evident as the right of the plaintiff in testifying on the trial to swear to the truth and to do justice by renouncing his unjust mortgage.

The statute gives the court unlimited power to ascertain and render "*such judgment as shall be just between the parties.*"

Whenever the judgment in replevin must in effect be a finding of the amount due on a chattel mortgage the suit, of necessity, must in effect be a foreclosure suit, and to prevent absurd circuity of action, as well as gross injustice, the court has the power and the means to do as is done by courts of chancery in foreclosure cases. Not only must payments made after the commencement of suit be allowed, but instalments falling due after the commencement of the suit must be included in the decree.

Howe et al, v. Lamon, 37 Mich., 164.
Vaughn v. Nims, 36 Mich., 297.

The first year of the chattel mortgage expired in May, 1876. The first trial in this suit was in June, 1876, (67); the second year of the chattel mortgage expired in May, 1877, the second trial in this suit was in September, 1877, (74).

The plaintiff's lien not being imperishable and being continually subject to be lessened or extinguished the attaching creditors were entitled to James M. Wood's yearly answer under oath, stating truly the interest which he had by virtue of the mortgage in the property therein mentioned.

Sec. 4709 above cited.

The law presumes that the affidavits of renewal would have been fair and true, and any such disclosure either year might have rendered a trial unnecessary; might have caused a payment or tender whereby the defendant would by subrogation have obtained the use of the lien, or judgment might have been rendered by consent on the affidavit as on a disclosure in garnishee proceedings.

If there must be a contest the affidavit of renewal, presumed to be true, would be equal to a true answer in chancery to a bill to foreclose the mortgage, and would be no less important in enabling the creditors to prepare for trial as to questions of fact and to questions of law.

The plaintiff was not, by wrongfully bringing this action, relieved from any duty or obligation as chattel mortgagee.

The finding shows that James M. Wood never had and never pretended to have any claim except as lien holder by virtue of his unforeclosed chattel mortgage. He chose to have no public sale and to continue a mere lien holder for years, probably to enable Charles Stewart to continue in business as the finding leaves him selling at retail the mortgaged goods.

There were many creditors. The law, in justice to all who might be concerned either as creditors or as purchasers at foreclosure sale or otherwise, required the annual renewal, and James M. Wood neither by unlawfully witholding the goods from foreclosure sale and thereby converting them to his own use, nor by this action of replevin without lawful cause of action, was released from the statutory duty of filing yearly annexed to the chattel mortgage the affidavit stating truly the nature of his interest and the true amount legally secured by his lien.

The conversion of the goods by the plaintiff to his own use and the contest in this action between the lien holders never lessened the importance and necessity of the renewal affidavits.

IV.

If the statutes for filing and renewing chattel mortgages had never existed, and if as against the attachments the chattel mortgage in this action once had priority, the acts and omissions of James M. Wood have been sufficient to do away with such priority and postpone his mortgage.

From May 25 to July 15th, 1875, Charles Stewart, under the trusts in his favor, was left selling at will and daily diminishing all that creditors could attach and gain by tender, payment and subrogation.

From July 15, the time the attachments were served, until October 19, 1875, when the action of replevin was commenced, no attempt was made by any means to enforce the mortgage by taking possession.

October 19th, 1875, the plaintiff wrongfully commenced this action of replevin and gave the replevin bond by which he was left in possession of the property replevied and free to proceed to public sale.

The judgment and finding of the court show that he elected to keep his mortgage unforeclosed and to have no public sale.

At any public sale the creditors could bid. As soon as the proceeds of the sales of separate articles would be sufficient to satisfy what was really and legally due to the plaintiff, his power to protect Charles Stewart from creditors, by means of the mortgage, would be at an end.

Executions and levies lose their priority as against liens which are subsequent, if there has been unjust and unreasonable delay and retention of possession without public sale.

Loverick v. Crowder, 8 B. & C., 132.

Russell v. Gibbs, 5 Cowen, 390.
Benjamin v. Smith, 4 Wen., 332.
Bank v. Berry, 2 Bush. Ky., 236.
Earle's Appeal, 13 Penn., 483.
Berry v. Smith, 3 Wash. C. C., 60.
Clorlius v. Stambridge, 5 Rawle, 286.
Action v. Knowles, 14 Ohio State, 18.

Want of diligence in prosecution will do away with any priority gained by a duly recorded lis pendens notice in chancery.

Trumble v. Boothby, 14 Ohio, 109.

The plaintiff, as against the attaching creditors, was legally bound to have the public sale with due diligence after taking possession.

Flanders v. Chamberlain, 24 Mich., 314.

The legal and equitable rights of the attaching creditors were such that James M. Wood, to retain any priority of lien, was bound to have a public sale with all due diligence.

The creditors could not legally be deprived of any of the chances which a public sale would give them.

James M. Wood, by disregarding his duty to have a public sale and thereby favoring Charles Stewart, did that which was like an extension of time given by a creditor to a debtor, without regard to the rights of sureties. He took possession Oct. 19, 1875, by means of the replevin suit and thus prevented any possibility of sales under process of court in the attachments. He chose to have no sale under his mortgages. He has prevented the mortgaged property from being brought to public sale in any manner whatever.

If one mortgagee of chattles can thus take possession with or without replevin, and can thus delay sale, all lien holders having priority can do likewise.

The amount of the debt secured can make no difference in the application of legal principles.

The greater the amount secured the worse the neglect to delay public sale.

From the date of the chattel mortgage James M. Wood was, as to more than half of the amount purporting to be secured by the chattel mortgage, only a voluntary trustee or assignee for the benefit of preferred creditors, one of whom, Harriet Stewart, having an elleged claim for $1465.46, never heard of the mortgage and had no privity therewith directly or indirectly un-

til considerable time after it was filed as a voluntary assignment for her benefit, Charles Stewart continuing to sell at retail under the trusts in his favor. So far as the mortgage lost valid priority for one day it lost priority forever.

V.

The chattel mortgage on its face implies that Charles Stewart was to continue in business, selling the goods in his own store for his own benefit as he had been selling them, and he did all that was implied.

In the description of property are the words, "all and singular the goods, chattels and stocks of every description and being in my hardware store at St. Joseph; also the team, harness and wagon that have been employed about the store in delivering and hauling the goods."

Oliver v. Eaton, 7 Mich., 108.
Gay v. Bidwell, 7 Mich., 520.
Engle v. Hart, 5 Shelden, 9 N. Y., 213.
Levenworth v. Hunt, 11 Wallace, 394.
In Re. Forbes, 5 Bissel, 512.
Griswold v. Sheldon, 4 Comstock, 4 N. Y., 587, 592.

That this implication renders the chattel mortgage inoperative or on its face fraudulent in law as against creditors is positively declared by the following authorities:

6 Wall., 78.
6 Wall., 299.
5 Bissel, 512.
11 Wall., 394.
Robinson v. Elliott, 22 Wall., 514.
1 Sawyer, 7.
4 Bank Reg., 378.
3 Bank Reg., 291.
5 Ohio State, p. 1.
2 Wen., 596.
Horton v. Williams, 21 Minn., 187.
72 N. Y., 424.

The question whether or not the chattel mortgage from Charles Stewart to the plaintiff is fraudulent in law is no question of construing Michigan statutes.

The question is one of general principles and the decisions of this court, 11 Wall., 394, 22 Wall., 514, supported by the best authorities, must prevail.

Town of Venice v. Murdoch, 92 U. S. Rep., 501.
Town of Pine Grove v. Talcott, 19 Wall., 666.
Carpenter v. The Providence Washington Ins. Co., 16 Peters, 512.

VI.

If the chattel mortgage was valid and entitled to priority it could create no lien, excepting so far as it secured a real debt and had sufficient consideration.

Terry v. Tuttle, 24 Mich., 213.
Fisher v. Meister, 24 Mich., 452.
La Due v. D. & M. R. R. Co., 13 Mich., 397.

There was no error in the finding of the court (75) that the plaintiff's lien could not cover the Elizabeth Stewart note, which represented $4092.12 of the alleged consideration and debt mentioned in the chattel mortgage, Exhibits 4th and 5th, referred to in the finding (75–77–81) show that Elizabeth Stewart owned this note at her death, which was prior to the assignment by heirs of hers, dated May 5th, 1875.

The absence of any administration or proceedings of any kind in any probate court was a sufficient reason for the exclusion of the note.

Cullen v. O'Hara, 4 Mich., 132.
Morton v. Preston, 18 Mich., 71.
Selky v. Hamilton, 22 Mich., 287.
Albright v. Cobb, 30 Mich., 360.
Howard v. Patrick, 38 Mich., 804.

The endorsement on this note dated May 24th, 1875, signed "Elizabeth Stewart, by Cornelia Stewart," was after the death of Elizabeth Stewart, a pretended transfer by a dead person, a significant part of the transaction. There is nothing to show what testimony was before the court in relation to this note and its alleged transfer to the plaintiff for collection. It is certain that he had no interest in the note except as a volunteer trustee.

Southerland v. First Nat. B'k of Ypsilanti, 31 Mich., 232.

So much of the finding as is of fact is no less conclusive than a verdict would have been.

So much of the finding as is of law is conclusive unless duly excepted to, and there must be due assignment of errors.

There is no claim in any form that there was any want of evidence or justice to support so much of the finding as shows the extent to which the amount due the plaintiff was reduced by payments.

All presumptions are in favor of the finding.

Peabody v. McAvoy, 23 Mich., 526.

The only question which the plaintiff in error could raise is this: Did the finding fail to support so much of the judgment as is adverse to him?

The special judgment as well as the amended finding (73) and the stipulation (62) certainly are sufficient to support the judgment (73) "that the defendant do recover against said plaintiff the said sum of $5575.10."

The plaintiff being a mere lien holder and having no cause of action in replevin, could in no event be entitled to judgment for any more than the amount of money justly and legally his due.

He can on the finding claim no more than court awarded to him unless every fact to entitle him to more is set forth in the finding as clearly and particularly as would be repuired in a special verdict.

The Abbottsford, 98 U. S. Rep., 443.
Lumber Co. v. Buchtel, 101 U. S. 637.
Kerr v. Clampst, 95 U. S., 190.
Sparrow v, Strong, 4 Wall., 584.
Graham v. Bayne, 18 How. U. S., 63.
Peabody v. McAvoy, 23 Mich., 526.
Yelverton v. Steele, 40 Mich., 540.
Burdick v. Chamberlain, 38 Mich., 610.

The finding shows that two notes alleged to be secured by the chattel mortgage were given (76) for interest on the real estate mortgage of Charles Stewart to Abram Terwillager (79), supposed to have accrued after said mortgage was paid.

The deed objected to Exhibit 6 (81) tended to show full payment and release of said mortgage in 1872. The deed was by Charles Stewart to Abram Terwillager; it was promptly recorded (83) and title claimed thereunder. (76.)

This deed was put in evidence as part of the proof which showed to the court that the two notes were without consideration. No bill of exceptions is here to present all of this proof.

After the deed was submitted in evidence James M. Wood was recalled as a witness in his own behalf and a single question put to him. (83.)

The attempt was to have Wood swear to information he had received from Stewart and Terwillager, (one being a resident of Michigan and the other of New York,) at any times and places whatsoever to contradict the recital in the deed and thus have the court admit in evidence mere information, undisguised hearsay, mere declarations by Stewart and Terwillager not under oath, escaping cross-examination and probably made shortly before the trial to prepare Wood to testify.

If the rulings of the court as to evidence set forth in Exhibit 6 (81) are erroneous the plainest principles of evidence must be abandoned.

GEORGE W. LAWTON,
Attorney for Defendant in Error.